

**IN THE 184th JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS**

AND

**THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

EX PARTE)	
CLARENCE CURTIS JORDAN,)	Cause No. 276428-A
APPLICANT)	Writ No. 17,434-02
)	
)	

SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

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I. INTRODUCTION

This case presents a troubling, yet remediable failure of Texas criminal justice. Mr. Jordan is an incompetent, brain-damaged person with an IQ that has been assessed at scores of 56 and 60. Mr. Jordan has been diagnosed with schizophrenia, “mental retardation,” and “organic brain dysfunction”—and was known during his trial as “Father Nature.” He has largely been unable to advocate or care for himself.

To date, Mr. Jordan has been on death row for nearly 50 years. Yet, he has not had a lawyer for over 30 years, and has spent that time utterly forgotten and wasting

away in a Texas prison. In the interim, Eighth Amendment jurisprudence has made clear that Mr. Jordan's death sentence is unconstitutional.

Until now, Mr. Jordan did not have a lawyer appointed to advocate for his interests. Because Mr. Jordan was sentenced by a jury that had no vehicle to consider the mitigating evidence in his case, and because Mr. Jordan is intellectually disabled, his unconstitutional death sentence must be overturned.

II. FACTUAL BACKGROUND

Mr. Jordan was born into a fractured family, and as one of eight siblings, his childhood was riddled with poverty and instability. Mr. Jordan saw very little of his father growing up and his mother died when he was twelve years old.

Significant cognitive issues were prevalent for Mr. Jordan from an early age. Mr. Jordan's first psychological evaluation was conducted when he was fifteen years old, and this is the only time Mr. Jordan was administered a comprehensive intelligence test. *See* Exhibit A.¹ On the Wechsler Intelligence Scale for Children (WISC), Mr. Jordan obtained a full-scale IQ of 56. *Id.* The examiner noted that Mr. Jordan suffered from neurological dysfunction leading to intellectual disabilities with possible organic deficit. *Id.* He was characterized as having a very low overall intellectual development. *Id.*

¹ May 18, 1971 Intellectual Evaluation of Clarence Curtis Jordan by Thomas H. Cook, Ph.D., Harris County Juvenile Probation Department, Mental Health Services Division, attached as Exhibit A.

Mr. Jordan was arrested and charged with capital murder committed during a robbery on or about October 14, 1977.

By the age twenty-one, Mr. Jordan began to experience mental health symptoms on top of his cognitive limitations.² In 1978, during his evaluation with Dr. Bloom before his first trial, Mr. Jordan shared instances of visual and auditory hallucinations, including seeing who he described as his wife in everything she does and hearing her talking to him, and hearing his mother talking to him after she died. Exhibit B³ at 1-2. Dr. Bloom conducted an intellectual assessment, which resulted in an IQ of 60, again placing Mr. Jordan in the mild mentally retarded range of intelligence. *Id.* at 3. The results further indicated the presence of mild to moderate organic brain dysfunction. *Id.*; *see also* Exhibit C.⁴

On August 21, 1978, following trial, a jury convicted Mr. Jordan of capital murder and returned a verdict consistent with a sentence of death. Four years later,

² Schizophrenia onset typically occurs in the late teens to early thirties, with men often experiencing symptoms in their early to mid-twenties. *See* Diagnostic and Statistical Manual – Text Revision (2022) [hereinafter DSM-5-TR] at p. 117 (“The requisite psychotic features of the schizophrenia diagnosis typically emerge between the late teens and the mid-30s ... [*t*]he peak onset age occurs in the early to mid-20s for men and in the late-20s for women.”) (emphasis added).

³ May 11 & 23, 1978 Psychological Evaluation of Clarence Curtis Jordan by J.M. Bloom, Ph.D., Forensic Psychiatric Unit, Harris County Psychiatric Hospital, attached as Exhibit B.

⁴ June 28, 1978 Psychological Evaluation of Clarence Curtis Jordan by J.M. Bloom, Ph.D., Forensic Psychiatric Unit, Harris County Psychiatric Hospital, attached as Exhibit C.

the Court of Criminal Appeals reversed Mr. Jordan's conviction and sentence on a jury selection issue. *See Jordan v. State*, 635 S.W.2d 522 (Tex. Crim. App. 1982).

In September and October 1983, the Harris County District Attorney retried Mr. Jordan and again sought a death sentence. At trial, counsel for Mr. Jordan presented expert testimony that Mr. Jordan suffered from "organic brain dysfunction," which an expert explained was akin to mental "retardation," and showed evidence of brain damage. 16 RR2 104.⁵ In addition, Mr. Jordan suffered from paranoid schizophrenia, characterized by hallucinations and delusions, including, among other things, that he was "Father Nature" and not Clarence Jordan. 16 RR2 101. The State did not dispute Mr. Jordan's serious mental illness, brain damage, and cognitive limitations. Rather, it argued that Mr. Jordan was nonetheless competent to stand trial and Mr. Jordan was likely to be a danger to society in the future. 16 RR2 130-39, 203-9.

In preparation for his second trial, on August 27, 1982, counsel for Mr. Jordan filed a motion for a CAT scan imaging to be completed on Mr. Jordan's brain to investigate the brain damage sequelae of a severe childhood head injury. The trial court, however, denied the motion on September 2, 1983.

⁵ The Reporter's Record from the first trial is cited herein as "RR1," with the relevant volume number preceding and the relevant page number following. The Reporter's Record from the second trial is cited as "RR2" using the same convention. The compiled, paginated clerk's record from the first trial is cited as "CR1" while the clerk's record from the second trial is cited as "CR2."

Less than a month later, Mr. Jordan was admitted to the Psychiatric Unit of the Harris County Jail, where he was administered anti-psychotic medication and remained until November 29, 1982. 12 RR2 8, 62. During this stay at the Psychiatric Unit, amid an evaluation, Mr. Jordan described in detail the hallucinatory activity he's experienced since he was a child. Exhibit D.⁶ Mr. Jordan reported hearing voices in his left ear and seeing "old, weird, burnt-up looking people [...] slashing at his ear." *Id.* at 2. Mr. Jordan shared that on one occasion "he was hiding under his blanket in a cell and one of the burnt-up looking people reached over and hit him on the head through the blanket." *Id.* Mr. Jordan had seen and heard things since he was a child, but he had never said anything about it. *Id.* Even though he was on medication during the evaluation, Mr. Jordan indicated the medication had not helped with the hallucinations, which had, in fact, gotten worse since his incarceration. *Id.* At one point during the interview, Mr. Jordan "stopped talking and brushed at his left ear with his hand," and when Dr. Brown asked him what he was doing, Mr. Jordan responded "I just want to get this shit out of my ear." *Id.*

At the end of November 1982, a few weeks after Dr. Brown's evaluation, Mr. Jordan was discharged from the psychiatric division only to be readmitted a few months later in March 1983. This time Mr. Jordan was held for psychiatric treatment

⁶ December 6, 1982 Competency Evaluation of Clarence Curtis Jordan by Jerome B. Brown, Ph.D., Mental Health and Mental Retardation Authority for Harris County, Attached as Exhibit D.

for a significantly longer period. 12 RR2 14. In fact, Mr. Jordan was held in the Psychiatric Unit until his October 1983 trial. During his stay at the psychiatric division of the Harris County Jail, Mr. Jordan was under the care of a psychiatrist, again receiving treatment and medication for his mental illness. 12 RR2 4.

On August 29, 1983, the Honorable Frank C. Price held pretrial motions on Mr. Jordan's second trial. At the commencement of the first proceedings pretrial, Mr. Jordan requested to address the Court, and told Judge Price that his name was not Clarence Jordan, but Father Nature. 1 RR2 4. After answering the Judge's questions with irrational statements, Mr. Jordan stated: "[A]ll I want to tell you is I'm Father Nature and I'm a ruler as well. That's all I have to tell you." 1 RR2 7. The Court agreed to call Mr. Jordan "Father Nature" for the remainder of the trial. *Id.*; *see also* 1 RR2 39 (asking about Mr. Jordan "How about Father Nature?").

A. 1983 Competency Proceedings

On October 3, 1983, the Mr. Jordan's counsel requested a competency hearing based on prior psychological evaluations, including Dr. Bloom's report indicating that Mr. Jordan obtained an IQ score of 60, which is in the mild mentally disabled range of intelligence. 10 RR2 11-12. In addition, Mr. Jordan's counsel argued that the number of errors on the Bender Gestalt test indicated neurological impairment. *Id.* The Court granted the motion, scheduling both the competency examinations and

the competency hearing for the next day. After doing so, the Court addressed Mr.

Jordan:

Father Nature, to you and your attorneys, it's your motion to have a hearing on your competency to stand trial. The state wants two doctors to examine you tomorrow morning before we go to trial, and I am ordering you to submit yourself for that examination, so that they will be qualified to testify in his Competency Hearing. Okay?

10 RR2 14.

At the time of the competency evaluations and competency hearing, Mr. Jordan remained in the Psychiatric Division of the Harris County Jail and continued to receive medication for his mental illness. 12 RR2 4. In arguing that their client was incompetent, trial counsel explained that, despite many attempts to discuss legal issues, Mr. Jordan “was unable to communicate adequately with or to assist counsel in the matters pertaining to the case.” *Id.* Counsel further stated “the defendant appeared not to have a rational or factual understanding of the proceedings, [and his] incompetency to stand trial has been substantiated by findings resulting from an examination by the Harris County Psychiatric Unit.” *Id.*

The first witness at the competency hearing was Mr. Milan, a social worker with the Harris County Jail Mental Health and Retardation Unit, who testified that Mr. Jordan was admitted to the unit twice in the last year after being formally screened by a psychiatrist and a social worker who, both times, determined that Mr. Jordan had psychiatric problems and required treatment. 12 RR2 7-9. Mr. Milan

testified that Mr. Jordan had suffered from delusions, including referring to himself as Father Nature, Ruler, and Indian Ruler, and referring to staff members as “creatures.” *Id.* at 11-12. The second time Mr. Jordan was admitted to the Psychiatric Unit, Mr. Milan noted Mr. Jordan did not know who he was, he would not answer to his name and was unable to carry on a rational conversation. *Id.* at 15.

A psychiatrist from the Mental Health and Mental Retardation Authority of Harris County (MHMRA), Dr. James C. Johnson, testified next at Mr. Jordan’s competency hearing. 12 RR2 17. Dr. Johnson had been treating Mr. Jordan since May 1983, and diagnosed him with paranoid schizophrenia. *Id.* at 18. Dr. Johnson testified that Mr. Jordan’s delusions included being Father Nature and feeling that the psychiatric staff were trying to poison him. *Id.* at 20. Mr. Jordan was being administered 400 milligrams of Thorazine, a “major tranquilizer” that “helps straighten out some of their thought processes.” *Id.* at 21. In the past, Mr. Jordan had been on higher doses of the same medication. *Id.*

Dr. Victor Elion also testified during the competency hearing. 12 RR2 60. Dr. Elion had seen, evaluated, and made treatment recommendations for Mr. Jordan and had found him incompetent at the end of 1982. *Id.* at 61. In March 1983, during Mr. Jordan’s second admission to the Harris County Psychiatric Unit, Dr. Elion again found him to be incompetent to stand trial. *Id.* 62. Yet, at the competency hearing,

Dr. Elion testified that Mr. Jordan was competent to stand trial, after months of anti-psychotic medication management. *Id.* at 64.

Mr. Jordan also testified himself during his competency hearing. Mr. Jordan detailed his arrival to the world,

[W]hen I come down here from—you can say from the sky or wherever, you know, make me no difference. When I come down here I was black all over. I was black all over. I come through computer time or I flew down hereby the power that I possessed. So I landed over there where I stay in Coleman, Texas. I can't remember going into my mother or anything like that, because I didn't really see all that I needed to see. I also remember I was going, I went to an Indian reservation, and I was in a crate, where the individual hold the baby, and things like that. I was going through different things with this power from house to house and things like this here. And like, it seemed like it was, it was real, it was really real, you know.

12 RR2 36. He described fighting green creatures with pointed ears using his hands and swords while incarcerated. *Id.* at 38. Mr. Jordan also testified that officers beat him really badly and stuck him with something in his spinal cord to the point that he could not move, but once the officers were done beating him, the power “hit him” and he had no scratches, nor marks, it was all gone. *Id.* 38-39. Mr. Jordan talked about how he just listens to the voices he hears, which sometimes come from “little old bitty witches, like little bitty creatures.” *Id.* at 39.

Mr. Jordan's narrative answer in response to one of counsel's first questions went on irrationally for some time until the Court interrupted him: “Father Nature, Mr. Johnson's question was: When was it in your mind that you stopped being

Clarence Curtis Jordan and went to being Clarence Curtis Brown?”. *Id.* at 41. Mr. Jordan was unable to answer the question and instead talked about being “Father Nature.” *Id.* at 41. He also testified that it did not matter what his defense attorney did to represent him because he had his own defense. *Id.*⁷

Despite evidence of brain damage, cognitive limitations and psychiatric illness, the Court nonetheless found Mr. Jordan competent to proceed.

B. Counsel for Mr. Jordan Presented a Wealth of Mitigating Evidence at His Trial

During the punishment phase of Mr. Jordan’s 1983 trial, defense counsel presented mitigation evidence pertaining to Mr. Jordan’s mental health. The defense’s first witness was Dr. Richard Joseph Carlson, a psychiatrist. 16 RR2 96. Dr. Carlson examined Mr. Jordan on three occasions, and reviewed reports prepared by psychologists that evaluated Mr. Jordan, resulting in a primary diagnosis of paranoid schizophrenia and a secondary diagnosis of “organic brain syndrome with delusions.” 16 RR2 99-100. During his testimony, Dr. Carlson described Mr. Jordan’s delusions and hallucinations, such as Mr. Jordan indicating he was Father Nature, a North American Indian, and, generally, someone other than Clarence Jordan. Dr. Carlson also described the visual and tactile hallucinations experienced

⁷ In the lead up to this hearing, Mr. Jordan subpoenaed several people including Jan Combs, one of the social workers on staff at the jail. *Id.* at 55. Mr. Jordan sought to have Ms. Combs testify because she knew him to be “Father Nature.” *Id.* at 44.

by Mr. Jordan from childhood: there were creatures inside his body, which “stuck” and tortured him. 16 RR2 101. Dr. Carlson further testified that Mr. Jordan was:

Generally [...] withdrawn into his own way of thinking, which defied reality of the outer world. His mood again during this interview came across as I observed it in him to be very blunt and flat in addition he was very inappropriate. He would have a smile frequently during the interview when there were no questions or anything appropriate during the discussion I had with him that would indicate this laughing or smiling called for. He showed further more evidence of loosened associations, that is in the association between on thought and the next did not connect well. One thought could jump into another and they were not logically connected.

16 RR2 102-103.

Apart from schizophrenia, Dr. Carlson diagnosed Mr. Jordan with possible organic brain dysfunction akin to “mental retardation.” 16 RR2 103. Several factors contributed to this diagnosis, including specifically Mr. Jordan’s “blunt, rather empty, flattened mood” throughout Dr. Carlson’s interviews. *Id.* Additionally, the psychological reports from prior evaluations included test results consistent to organic brain dysfunction. 16 RR2 104.

The second mitigation witness for the defense in the punishment phase of the 1983 trial was Dennis Milam, the psychiatric social worker at the Harris County Psychiatric Forensic Unit. 16 RR2 152. Mr. Milam testified that he first met Mr. Jordan in September 1982, during Mr. Jordan’s two month stay at the Harris County Jail Psychiatric Forensic Unit. 16 RR2 154-155. He also provided treatment to Mr. Jordan when he was readmitted to the Unit in March 1983, at which point he

remained in the Psychiatric Unit for over six months, until his trial commenced in October 1983. 16 RR2 155. Mr. Milan recalled Mr. Jordan as:

Very delusional [...]. [Mr. Jordan] refused to be addressed by his given name, but instead had taken another name, actually a title as he referred to it, which he requested or demanded to be called by. [...] it was very hard to get him to talk about anything other than that issue. It seemed to be the only thing he wanted to talk about, the only thing he was interested in. It was very difficult to get a social history on him [...]. He was not in group therapy at that time and he was not considered to be able to participate.

16 RR2 156.

The last witness called by the defense was Tom Yeakey, a Deputy Sheriff with the Harris County Sheriff's Office. 16 RR2 160. Mr. Yeakey testified he had been in charge of transporting Mr. Jordan to court throughout the proceedings and Mr. Jordan had been cooperative and had not caused any problems. *Id.*

The jury was then asked to answer two special issues:

- i. Special Issue 1: Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
- ii. Special Issue 2: Do you find from the evidence beyond a reasonable doubt that there is a probability the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

16 RR2 211-112. On October 10, 1983, after the jury answered both questions in the affirmative, Mr. Jordan was sentenced to death. 16 RR2 214-215.

On appeal, counsel for Mr. Jordan raised four points of error, including the denial of a medical expert who might opine as to brain damage suffered by Mr. Jordan. The Court of Criminal Appeals, however, affirmed. *Jordan v. State*, 707 S.W.2d 641 (Tex. Crim. App. 1986).

On June 19, 1987, counsel for Mr. Jordan filed an application for writ of habeas corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure. The writ contained a single claim: Mr. Jordan was incompetent to be executed pursuant to the then newly decided Supreme Court case, *Ford v. Wainwright*, 477 U.S. 399 (1986).

After considering three psychological evaluations as evidence, each of which concluded that Mr. Jordan was unable to comprehend the “pendency, nature, and purpose of his execution,” the convicting court recommended relief on Mr. Jordan’s *Ford* claim in 1987. *Ex parte Jordan*, 758 S.W.2d 250 (Tex. Crim. App. 1988). The following year, this Court followed the trial court’s recommendation and, in the first Texas case interpreting *Ford v. Wainwright*, held that Mr. Jordan was incompetent to be executed and stayed his execution until such a time wherein he regained competence. *Ex parte Jordan*, 758 S.W.2d 250 (Tex. Crim. App. 1988). Since that time, Mr. Jordan’s incompetence to be executed has not been in doubt.⁸

⁸ This Court also denied counsel for Mr. Jordan’s request that Mr. Jordan be transferred to a state psychiatric hospital, noting that “*Ford* only prohibits the execution of the insane and does not itself require treatment” and the law prohibited the transfer of mentally ill persons under sentences of

The end of the *Ford* litigation in 1988 marks the last time litigation took place on Mr. Jordan's behalf. In the years since, as the Supreme Court decided several cases that would have provided the basis of a new challenge to the constitutionality of his death sentence, Mr. Jordan remained unrepresented.

In the ensuing years, except for occasional letters from Mr. Jordan, the clerk's record does not reflect any additional action on Mr. Jordan's case. In April 2000, however, Mr. Jordan wrote Judge Jan Krockner, then-presiding Judge for the 184th District Court, and asked when his trial was going to be held, saying that he had additional evidence to present. He also wrote a second letter to the court in October 2000. In response to the second letter, it appears that Judge Krockner looked into the case by calling Ms. Moore, the last-known appellate lawyer for Mr. Jordan, and Assistant District Attorney (ADA) Roe Wilson, the then-chief of the post-conviction litigation section at the Harris County District Attorney's Office. In a memo to file, Judge Krockner summarized her conclusions, which included the following: "Main issue this time is def. had a head injury that was mitigating. Case was looked at carefully in the 80's. There appears to be no reason to appoint a lawyer at this time." Note to File, *State v. Jordan*, No. 276428 (184th Dist. Ct., Harris County, Tex. Oct. 25, 2000).

death to mental hospitals, even though such treatment would have been "more intensive and... preferable." *Ex parte Jordan*, 758 S.W.2d 250, 254 (Tex. Crim. App. 1988).

In September 2004, Judge Krocker again emailed ADA Roe Wilson, and asked her to let the Court know if the State believed Mr. Jordan's condition had changed and that he was no longer incompetent, because otherwise the Court would take no action. It appears that no action was taken in response.

In 2017, the General Counsel of the Court of Criminal Appeals wrote the court inquiring about the case and asked for a status update. On April 27, 2017, Judge Krocker wrote a letter in response, saying that the court had taken no action since Mr. Jordan was determined incompetent to be executed. Judge Krocker also indicated that she spoke that week to ADA Shawna Reagin who told her that Mr. Jordan "had suffered a stroke and currently the State is not pursuing execution." *See* Response from Judge Jan Krocker to Letter of March 28, *State v. Jordan*, No. 276428 (184th Dis. Ct., Harris County, Tex. Apr. 27, 2017).

Mr. Jordan is presently confined to a hospital bed at the Estelle Unit, in a maximum-security prison hospital wing. Upon information and belief, due to Mr. Jordan's status as a death-sentenced person (albeit one who had been adjudged incompetent and constitutionally ineligible for the death penalty for the better part of thirty years) and TDCJ's classification policies, TDCJ medical staff are unable to

provide him the same level of care that he would receive were he sentenced to punishment other than death.⁹

III. CLAIM I: Mr. Jordan Was Deprived of His Right to Have a Jury Consider All Mitigating Evidence Before Sentencing Him to Death in Violation of the Eighth Amendment of the U.S. Constitution

The jury deciding Mr. Jordan's fate heard classic mitigating evidence about Mr. Jordan's background. 16 RR2 96-163. It heard that he was possibly brain damaged and "mentally retarded." *Id.* at 99. It heard that he was diagnosed and had received intensive psychiatric treatment for schizophrenia. *Id.* at 99, 155-157. It heard that he experienced auditory and visual hallucinations and delusions, and that believed that he was "Father Nature," a North American Indian. *Id.* at 99-103. It heard his thought process "defied reality of the outer world." *Id.* at 102. Yet, the jury

⁹ Undersigned counsel encountered Mr. Jordan when representing Syed Rabbani, another person who had been sentenced to death unconstitutionally. Mr. Rabbani was the next-door neighbor of Mr. Jordan in the Estelle Unit. After OCFW was appointed to represent Mr. Rabbani, OCFW, in cooperation with the Harris County District Attorney, litigated a claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Court of Criminal Appeals granted relief to Mr. Rabbani on September 6, 2023. *Ex parte Rabanni*, WR-86,593-01 (Tex. Crim. App. Sept. 6 2023) (Unpublished). Mr. Rabbani was later resentenced to life in prison with the possibility of parole. *See* Clare Amari, 'Forgotten' inmate Syed Rabbani taken off death row after waiting nearly 30 years, HOUS. LANDING (Nov. 14, 2023), <https://houstonlanding.org/forgotten-inmate-syed-rabbani-taken-offdeath-row-after-nearly-30-years/>. After being resentenced and becoming eligible for transfer to a more supportive medical facility, Mr. Rabbani was transferred to the skilled care/assisted living/geriatric unit of the Young Medical Facility. Because of his death sentence, TDCJ classification policies limited the provision of medically appropriate care (the record in Mr. Rabbani's case reflects that TDCJ medical staff repeated recommendations to transfer him to hospice were denied due to his death sentence). Like Mr. Rabbani, Mr. Jordan's medical condition renders him bed-bound with a myriad of medical and physical challenges. Like Mr. Rabbani, Mr. Jordan was forgotten by the Texas criminal justice system for decades, despite being confined under an unconstitutional death sentence.

did not have a vehicle through which it might consider these “mitigating factors stemming from the diverse frailties of humankind.” *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

In 1989, six years after Mr. Jordan’s second trial, conviction and sentence, the Supreme Court of the United States decided *Penry v. Lynaugh*, 492 U.S. 302 (1989). In *Penry*, the Court held that a jury needs to be “provided with a vehicle for expressing its ‘reasoned moral response’ to [mitigating] evidence in rendering its sentencing decision.” 492 U.S. 302, 328 (1989). It is not enough to simply allow defendant to *present* mitigating evidence to the jury, the jury must also be able to *use* that evidence when deciding whether a death sentence is appropriate. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). To use this mitigating evidence in a sentencing decision is critical, as the *Penry* Court observed, “evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” *Penry*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)). Put another way, because *Penry*’s jury lacked specific instructions informing them that they could *consider* and *give effect* to mitigating evidence by declining to impose the death penalty, the *Penry* court found that the jury could not

give such an effect and it compelled a remand for a new sentencing proceeding. *Id.* See also *Ex parte Moreno*, 245 S.W.3d 419 (Tex. Crim. App. 2008); *Ex parte Hathorn*, 296 S.W.3d 570 (Tex. Crim. App 2009).

Although the Supreme Court has interpreted Texas' capital punishment statute to meet the requirements of the Eight and Fourteenth Amendments, as long as the special issues are interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present – see, e.g., *Jurek v. Texas*, 428 U.S. 262 (1976); *Penry v. Lynaugh*, 492 U.S. 302 (1989) – that was not the case in Mr. Jordan's capital trial.

At Mr. Jordan's 1982 punishment trial, there was ample information about Mr. Jordan's mental health, a significant amount which was presented to the jury. However, because of the narrowness of the special issues, there was no means for the jury to put these quintessential mitigating factors into relevant context, and defense counsel was confined to focus their case on "deliberateness" and "future dangerousness." The manner in which the special issues were framed provided no venue for counsel to expand and explain to the jury how Mr. Jordan was a "uniquely individual human being." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Therefore, the special issues in Mr. Jordan's case precluded the jury from giving mitigating effect to Mr. Jordan's ample evidence of mental illness, intellectual disability, brain damage, and good character, in violation of *Penry*.

Even within these constraints, strong mitigation evidence still made it to the jury—a jury that did not know what to do with it. The defense’s first witness during punishment was Dr. Carlson, a psychiatrist who testified that after examining Mr. Jordan and reviewing reports from other medical professionals, he diagnosed Mr. Jordan with paranoid schizophrenia, and a secondary diagnosis of organic brain syndrome with delusions. 16 RR2 99-100. Dr. Carlson detailed for the jury how he found Mr. Jordan to be floridly psychotic during his examination, and how Mr. Jordan “indicated that he heard voices speaking to him and had heard them as a child as well and heard them for many years.” 16 RR2 100. Dr. Carlson testified that he watched Mr. Jordan hallucinate in front of him, as Mr. Jordan appeared distracted during the interview, as if he were hearing a voice or voices, which Mr. Jordan confirmed was the case. *Id.* Mr. Jordan delusionally believed he was alternately Father Nature, a Native American Indian or C.C. Brown. 16 RR2 101. He reported that there were little creatures inside his body that tortured him and had been with him since childhood. *Id.* He also described that his life was on films, in the possession of a different type of creature. *Id.* During his clinical interview, Mr. Jordan’s thoughts were disorganized and loosely associated. In all Mr. Jordan’s thinking “defied reality.” *Id.* Dr. Carlson testified that Mr. Jordan had loosened associations, meaning the associations between one thought and the next did not connect well or logically. *Id.* at 103. Dr. Carlson also described to the jury that Mr.

Jordan had “a rather empty sort of, flattened sort of mood apparent on his face with his facial features,” 16 RR2 100, and that Mr. Jordan came across as very blunt, flat, and inappropriate. 16 RR2 102.

Dr. Carlson also recounted for the jury Mr. Jordan’s organic brain dysfunction. Mr. Jordan’s “blunt, empty, flattened mood” throughout the interviews he administered, coupled with the psychological reports, and the visible head injury on Mr. Jordan, led him to believe Mr. Jordan suffers from this condition. 16 RR2 103-104. Dr. Carlson explained to the jury that a person who suffers from organic brain syndrome is akin to mild mental retardation, with decreased intellectual functions and learning ability. Dr. Carlson testified he thought organic brain syndrome was consistent with Mr. Jordan’s results from his psychological testing. *Id.* at 103, 108.

The jury also heard that because Mr. Jordan’s mental illness was so severe, it was challenging for providers to get meaningful information about his childhood. Mr. Milam, the jail psychiatric unit’s social worker, testified that “it was very difficult to get a social history on [Mr. Jordan],” because it was “very hard to get him to talk about anything other than [his refusal to be addressed by his given name]”. 16 RR2 155.

Both Mr. Milam and Mr. Yeakey provided mitigation evidence as to Mr. Jordan’s good character. Mr. Milam noted Mr. Jordan’s improvement during treatment and his interest and willingness to take medication and group therapy. 16

RR2 157. He described him as “a lot more cooperative, alert, and more outgoing” as well as an active participant in group therapy after starting treatment. *Id.* Mr. Yeakey, similarly, testified that Mr. Jordan had been very cooperative and had given him no trouble. 16 RR2 160. Mr. Yeakey was in charge of transporting Mr. Jordan from the courtroom back and forth to the jail during the 1983 proceedings, which at the point of his testimony had been going on for over a month and his interactions with Mr. Jordan had always been uneventful. *Id.*

Mr. Jordan had ample mitigation evidence presented to his 1983 jury about his serious mental illness and diminished intellectual functioning, together which prevented Mr. Jordan from meaningfully understanding his reality, as well as his positive character in spite of those limitations. But without the appropriate jury instructions, Mr. Jordan’s jury was left without a means to consider this evidence in deciding whether Mr. Jordan should live or die, in exactly the way that *Penry* sought to correct. Because Mr. Jordan’s death sentence was imposed in violation of the Supreme Court’s ruling in *Penry* and progeny, it must be vacated.

IV. CLAIM II: Mr. Jordan is Intellectually Disabled and Ineligible for Execution Under the Eighth and Fourteenth Amendment of the U.S. Constitution

In 1971, nearly 30 years before the Supreme Court held that the execution of the intellectually disabled violated the Eighth Amendment, Mr. Jordan’s intellectual functioning was assessed. He was only 15 years old, and his IQ of 56 fell well within

the range of what at the time was known as mental retardation. Mr. Jordan's struggles were apparent to observers and evident during this adolescent evaluation; he was described "very dull, simple and underdeveloped." Exhibit A. This initial assessment was corroborated years later by another assessment, each of which found him cognitively limited. Mr. Jordan has an intellectual disability, which makes his death sentence unconstitutional under the Eighth Amendment. Yet until now, Mr. Jordan was left without a lawyer to advocate for his interests after this Court's 1988 opinion finding him incompetent to be executed. Because his death sentence is unconstitutional in light of his intellectual disability, Mr. Jordan asks that this Court grant him relief.

A. The Legal Standard for Intellectual Disability

In 2002, the Supreme Court established that the execution of people with intellectual disabilities violates the Eighth Amendment of the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court explained:

Those [intellectually disabled] persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants.

Atkins, 536 U.S. at 306-07.

To determine who qualifies for an intellectual disability diagnosis and exclusion from the death penalty, courts must be guided by the “clinical definitions” of intellectual disability, *see id.* at 317 n. 22, as elucidated by the medical community. *See id.* at 308 n. 3. In determining the prevailing medical community consensus, the Supreme Court has relied on both the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM) and the American Association on Intellectual and Developmental Disabilities’ Diagnostic and Statistical Manual of Mental Disorders (AAIDD).¹⁰ *See, e.g., Atkins*, 536 U.S. at 308, *Moore I*, 137 S. Ct. at 1048-50. Although these authorities vary slightly in their language, both require: 1) deficits in intellectual functioning; 2) deficits in adaptive functioning; and 3) onset during the developmental period. DSM-5-TR at 37; *see also* AAIDD-12 at 15-17.

a. The Medical Diagnostic Standard for Intellectual Disability

The DSM-5-TR defines intellectual developmental disorder (intellectual disability) as “a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.” DSM 5-TR at 37. In order to establish a diagnosis, the DSM-5-TR following three criteria must be met: A) deficits in intellectual functions; B) deficits

¹⁰ The most current publications are the Fifth Edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition, Text Revision* (2022) (DSM-5-TR) and the Twelfth Edition of the American Association on Intellectual and Developmental Disabilities’ *Intellectual Disability: Definition, Classification, and Systems of Supports* (2021) (AAIDD-12).

in adaptive functioning; C) onset of intellectual and adaptive deficits during the developmental period. *See* DSM-5-TR at 37.

Similarly, the AAIDD defines intellectual disability as being “characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.” AAIDD-12 at 13.¹¹

i. Prong One: Significantly Subaverage Intellectual Functioning

Prong one of an intellectual disability diagnosis is typically measured by “individually administered and psychometrically valid, comprehensive, and culturally appropriate tests of intelligence,” also referred to as an intelligence quotient (IQ) test. DSM-5-TR at 38. To satisfy this prong, an individual must show significantly subaverage intellectual functioning, generally determined by an IQ score approximately two standard deviations below the mean. Because measurement is imperfect, the significantly subaverage range includes a margin for the standard error of measurement (SEM), which on most tests is ± 5 points. *See* DSM-5-TR at 41; AAIDD-12 at 13.

¹¹ The only notable difference between the two is that the AAIDD-12 defines the developmental period as up to age 22, whereas the DSM-5-TR leaves that period undefined.

The Supreme Court in *Hall* explicitly recognized the importance of considering the SEM present in testing instruments, as is consistent with the consensus of experts. *See Hall v. Florida*, 572 U.S. 701, 713 (2014) (“The SEM reflects the reality that an individual’s intellectual functioning cannot be reduced to a single numerical score.”). As a result, an IQ score of 75 is “squarely in the range of potential intellectual disability.” *Brumfield v. Cain*, 576 U.S. 305, 315 (2015); *see also Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010) (“[A]ny score could actually represent a score that is five points higher or five points lower than the actual IQ.”); *Ex parte Modden*, 147 S.W.3d 293, 298 (Tex. Crim. App. 2004) (a 70-75 IQ score “generally indicates subaverage intellectual functioning”).

Test scores are approximations of a person’s intellectual functioning but not sufficient to assess reasoning in real-life situations and mastery of practical tasks. DSM-5-TR at 42.

ii. Prong Two: Deficits in Adaptive Functioning

In addition to intellectual deficits, an intellectual disability diagnosis requires evidence of significant deficits in adaptive functioning. Deficits in adaptive functioning “refer to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background.” DSM-5-TR at 42; *see also AAIDD-12* at 29 (“Adaptive behavior is the collection of conceptual, social and practical skills that have been

learned and are performed by people in their everyday lives.”). This includes assessing how an individual is able to “function across a variety of dimensions.” *Petetan v. State*, 622 S.W.3d 321, 339 (Tex. Crim. App. 2021) (citing *Brumfield*, 576 U.S. at 317).

The adaptive deficits prong of an intellectual disability diagnosis requires deficits in only one of three domains of adaptive functioning: conceptual, social, and practical. DSM-5-TR at 42 (noting prong two “is met when *at least one* domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired that ongoing support is needed in order for the person to perform adequately across multiple environments, such as home, school, work, and community.”); *see also* AAIDD-12 at 31. The conceptual domain includes skills such as academic skills, problem solving, thinking abstractly, and difficulty communicating thoughts and ideas. AAIDD-12 at 30. The social domain includes functioning in areas such as interpersonal skills, social responsibility, social problem solving, communication, and language skills. DSM-5-TR at 39. The practical domain involves learning and self-management across life settings such as personal care. DSM-5-TR at 42. Because “[w]ithin an individual, limitations often coexist with strengths,” *see, e.g.,*

AAIDD-12 at 15, the second prong of intellectual disability is met by clinical evaluation of deficits and is not negated by strengths.¹²

iii. Prong Three: The Disabilities Manifested During the Developmental Period

For an intellectual disability diagnosis to be possible, the onset of a person’s intellectual and adaptive deficits needs to be during the developmental period.¹³ DSM-5-TR at 42. This prong refers only to recognition that “deficits are present during childhood or adolescence.” DSM-5-TR at 42. This prong, however, does not require a *diagnosis* of intellectual disability during the developmental period, only evidence that such disability *manifested* prior to the end of the developmental period. *Cf. Brumfield*, 576 U.S. 305, 324 (2015) (“If Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child.”).

B. Mr. Jordan Meets the Criteria for Intellectual Disability

a. Neuropsychological Testing Shows Mr. Jordan’s Significantly Subaverage Intellectual Functioning

¹² See, e.g., *Moore v. Texas (Moore II)*, 139 S. Ct. 666 (2019) (emphasizing the importance of relying on adaptive deficits, instead of strengths).

¹³ The AAIDD defines the developmental period as being from birth to age 22. See AAIDD-12 at 33. The DSM-5-TR is silent on the upper bound of the developmental period.

While incarcerated, Mr. Jordan underwent several psychiatric evaluations by different mental health professionals; two of these evaluations included validated intellectual testing¹⁴. *See* Exhibit A, Exhibit B.

On May 18, 1971, at the request of the Harris County Juvenile Probation Department, fifteen-year-old Clarence Jordan underwent neuropsychological testing. Exhibit A at 1. These tests included the Weschler Intelligence Scale for Children (WISC), the Draw-A-Person Intellectual Ability Test (DAP), and the Bender-Gestalt. *Id.* Mr. Jordan scored in what was then called the “mental defective” range on the WISC. *Id.* His full-scale IQ was 56, which would place him well into the range of an IDD diagnosis. *See* Exhibit A at 1; *see also Modden*, 147 S.W.3d at 298 (finding that even a 70-75 IQ score “generally indicates subaverage intellectual functioning”). When considering the standard error of measurement, Mr. Jordan’s full-scale IQ falls in the 51-61 range.

As the examiner explained in a report summarizing the juvenile Mr. Jordan’s abilities, Mr. Jordan was “a very dull, simple, underdeveloped boy whose intellectual potential is likely not any greater than” the 56 IQ indicated. Exhibit A. The disabilities shown during his testing further suggested the possibility of “organic

¹⁴ Years after these first two evaluations with consistent IQ scores, Dr. Jerome Brown visited Mr. Jordan and, in the context of a broader evaluation, estimated his functioning fell “in the dull normal range of intelligence (IQ=80-85).” Exhibit D, at 2. There is no information in the record as to whether any test was administered and, if so, whether it was a valid and reliable instrument.

deficits.” *Id.* Additionally, the examiner noted that Mr. Jordan was “a boy with a very low overall intellectual development.” *Id.* This test, at age fifteen, was corroborated by another seven years later, which also revealed Mr. Jordan’s cognitive functioning to be squarely within the range of intellectual disability.

On May 11, 1978, Dr. J. M. Bloom conducted a psychological evaluation of twenty-two-year-old Mr. Jordan, including the administration of the Ammons test, which measures adult intelligence, the Bender Gestalt, and the Rorschach Inkblot Technique. Exhibit B at 3. On the Ammons test, Mr. Jordan obtained an IQ score of 60, which again placed him within the intellectually disabled range, or as Dr. Bloom described, in the “mild mentally retarded range of intelligence.” *Id.* Dr. Bloom further indicated that the significant number of errors Mr. Jordan had on the Bender Gestalt test indicated the presence of organic brain dysfunction. *Id.* Mr. Jordan’s organic brain dysfunction is reinforced by testimony at his 1983 competency hearing by Dr. Johnson,¹⁵ as well as during his punishment phase proceedings by Dr. Carlson.¹⁶ At the time of this testing, Mr. Jordan had just turned twenty-two years old.

¹⁵ During a competency hearing held on October 4, 1983, while testifying Dr. James C. Johnson explained that organic dysfunction is “an impairment of brain function caused by some toxic or chemical or bacterial poisoning or lack of blood supply.” 12 RR2 24. A condition that “usually [] never gets better and most of the times gets progressively worse.” *Id.*

¹⁶ On October 6, 1983, during punishment proceedings, Dr. Richard Joseph Carlson testified that his diagnosis of Mr. Jordan included a “tentative diagnosis of organic brain dysfunction.” 16 RR2

As the Supreme Court noted in *Hall*, an IQ test generally reflects a range of IQ scores for a particular administration. Mr. Jordan’s intellectual functioning testing has consistently found him cognitively limited and placed him in the intellectual disability range.

b. Mr. Jordan has Shown Deficits in his Adaptive Functioning

To qualify for an intellectual disability diagnosis, Mr. Jordan need only demonstrate deficits in just one of the three domains of adaptive functioning. *See* DSM-5-TR at 42. Mr. Jordan’s adaptive functioning deficits are evidenced by the observations of the experts that evaluated him. Here, the decades-old, prior expert evaluations of Mr. Jordan provide ample evidence of his deficits in the social and conceptual domains. Specifically, one of his examiners noted deficits in the social domain describing Mr. Jordan as “massively lacking in social comprehension.” Exhibit A. This manifested in Mr. Jordan having engaged in inappropriate questioning during the intellectual testing, which, Dr. Cook opined, demonstrated a lack of social awareness and understanding of the evaluation. *Id.* As a fifteen-year-old, Mr. Jordan “did not have any sense of social appropriateness and his behavior [was] often random and very pointless.” *Id.* As a result, Mr. Jordan was “apt to act very impulsively without an awareness of any consequences of his behavior.” *Id.*

103. Dr. Carlson then described that a person who suffers from organic brain dysfunction “may have some mild mental retardation, some mildly decreased intellectual functions and learning ability [...], they may not think as clearly as well as [...] someone that doesn’t the have that type of problem.” *Id.* at 109.

This suggested that Mr. Jordan had poor self-awareness and “understanding of his position in the social context.” *Id.*

Similarly, Mr. Jordan showed clear signs of deficits in the conceptual domain, with respect to his ability to communicate his thoughts and academic learning. When he was fifteen, his first intellectual evaluation noted that he had “tremendous learning deficits and poor social awareness,” irrespective of medication management. Exhibit A. Later, when Mr. Jordan was twenty-two, Dr. Bloom noted that he “often mumbled in an incoherent manner, and was vague in response to direct questioning,” Exhibit B at 1. When asked, Mr. Jordan could not give the exact date of his birth. *Id.* He said he was married but did not know for how long, or his wife’s address. *Id.* Even at age twenty-two, he did not know who the president of the United States was. *Id.*

c. Mr. Jordan’s Deficits in Intellectual and Adaptive Functioning Were Present During his Developmental Period

Mr. Jordan’s first intellectual evaluation, which demonstrated significant intellectual and adaptive deficits was conducted when he was fifteen years old, well within the developmental period for both the DSM-5-TR and the AAIDD-12. At the conclusion of that evaluation, the examiner noted that Mr. Jordan’s intellectual potential was likely not any greater than his testing that resulted in a full-scale IQ score of 56. *See* Exhibit A at 1. That examiner also noted several of Mr. Jordan’s adaptive deficits in her report, also present during his developmental period. *See*

supra, Section IV.B.b. Adaptive deficits were still present when Mr. Jordan was twenty-two and underwent another evaluation. Dr. Bloom’s report details similar adaptive deficits than those listed by the first examiner, corroborating the accuracy of their observations. *See* Exhibit B.

Consequently, Mr. Jordan satisfies the third prong of an intellectually developmental disorder diagnoses—that the onset of his deficits occurred during the developmental period.

V. Mr. Jordan’s Claims Should be Authorized Under Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1)

Article 11.071 § 5(a) specifies different gateways for authorizing litigation of a subsequent Texas post-conviction application. Mr. Jordan’s *Penry* claim should be authorized under § 5(a)(1) because *Penry v. Lynaugh* resulted in a legal basis unavailable at the time of Mr. Jordan’s trial, appeal and post-conviction proceedings. Similarly, Mr. Jordan’s *Atkins* claim should be authorized under § 5(a)(1) because *Atkins v. Virginia*, 536 U.S. 304 (2002), was likewise unavailable at the time of Mr. Jordan’s prior litigation.¹⁷

¹⁷ Due to the low average IQ obtained of Mr. Jordan at different times, if not under Article 11.071 § 5(a)(1), his *Atkins* claim should be authorized under § 5(a)(3), because Mr. Jordan demonstrates “that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is [intellectually disabled].” *Ex parte Blue*, 230 S.W.3d 151, 154 (Tex. Crim. App. 2007). Recognizing the importance of the Eighth Amendment interest to be protected, this Court in *Blue* created a gateway for the litigation of intellectual disability claims brought by persons who had failed to avail themselves of an earlier meaningful opportunity to raise an intellectual disability claim. *Id.* More precisely, *Blue* requires

Under Section 5 of Article 11.071, this Court may consider the merits of a subsequent application for writ of habeas corpus only if the application contains sufficient facts showing that one of three exceptions is met. Tex. Code Crim. Proc. art. 11.071 § 5(a). In relevant part, Section 5(a)(1) provides that a court may consider the merits of a subsequent application when:

The current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article...because the legal basis for the claim was unavailable on the date the applicant filed the previous application[.]

Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1). Subsection 5(d), in turn, provides that a legal basis was “unavailable on or before [the date of the previous post-conviction application filing] if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.” Tex. Code Crim. Proc. art. 11.071 § 5(d).

an inmate with an *Atkins* claim receiving § 5(a)(3) treatment to provide “sufficient specific facts that, *if true*, would establish by clear and convincing evidence that no rational fact finder would fail to find [ID].” *Id.* at 162 (emphasis added). *Blue* expressly requires that the § 5(a)(3) inquiry be treated as a sufficiency-of-the-pleading question, and that it not be used to conduct the type of analysis that takes place in the forum for primary fact-finding. In other words, *Blue* does not allow this Court to draw inferences against Mr. Jordan, as it is “only to review the adequacy of the pleading.” 230 S.W.3d at 163; *see also id.* (“It would be anomalous to require the applicant to actually convince us by clear and convincing evidence at this stage.”).

The Texas Court of Criminal Appeals has explained that this exception is triggered when there is a subsequent, directly applicable Supreme Court decision that contradicts the CCA's law at the time of the previous application. *Ex parte Martinez*, 233 S.W.3d 319, 322 (Tex. Crim. App. 2007) (authorizing a claim under § 5(a)(1) when a “subsequent writ is based on binding and directly relevant United States Supreme Court precedent decided after applicant had exhausted [his] claim at trial and on direct appeal and after applicant had filed his first state habeas application”); *see also Ex parte Hood*, 304 S.W.3d 397, 405 n.40-41 (Tex. Crim. App. 2010) (*Hood II*) (collecting sources largely relying on *Martinez*, *supra*).

a. Mr. Jordan's *Penry* Claim Should be Authorized Under Article 11.071 § 5(a)(1)

Penry v. Lynaugh was decided by the Supreme Court in 1989, two years after Mr. Jordan's first and only writ of habeas corpus. Mr. Jordan's writ included only one claim, that he was incompetent. A *Penry* claim was not raised in Mr. Jordan's prior filing and it could not have been because it was not an available legal basis at the time. Through *Penry*, the Court established that the Eighth and Fourteenth amendments require that a jury should be instructed that they may give meaningful consideration to mitigation evidence in determining whether a person should live or die. *Penry*, 492 U.S. at 320. Because the legal basis for this claim was unavailable to Mr. Jordan, this Court should allow Mr. Jordan's *Penry* claim to proceed under the “new legal basis” exception of § 5(a)(1).

b. Mr. Jordan's *Atkins* Claim Should be Authorized Under Article 11.071 § 5(a)(1)

In 2002, the Supreme Court decided *Atkins v. Virginia*, concluding that death an excessive punishment for a “mentally retarded criminal.” *Atkins*, 536 U.S. at 321. The Court’s decision drastically changed the capital punishment framework, creating new law directly applicable to Mr. Jordan. Through *Atkins*, the Court created a categorical rule making intellectually disabled offenders ineligible for the death penalty. *Id.* at 320.

The legal basis for this *Atkins* claim was previously unavailable to Mr. Jordan. *See* Tex. Code Crim. Proc. art. 11.071§ 5(d). At all times since *Atkins* was decided, Mr. Jordan has been indisputably incompetent, addled by schizophrenia, operating with an IQ in the intellectual disability range, and without counsel. As such, despite Mr. Jordan being under a sentence of death for the better part of 47 years and at all times since *Atkins* was decided, this is his first opportunity to raise this issue. As such, this Court should allow Mr. Jordan’s *Atkins* claim to proceed under the “new legal basis” exception of § 5(a)(1).

Additionally, because Mr. Jordan has shown a good faith basis for believing that discovery will yield evidence showing a constitutional violation, and he has established a prima facie case of meeting § 5, the Court should authorize his subsequent application and order discovery of records in the possession of the

State.¹⁸ See *In re Tex. Dep't of Criminal Justice*, No. WR-95,689-01, 2025 WL 907711 (Tex. Crim. App. Mar. 26, 2025). Mr. Jordan necessitates access to information maintained by the State to further develop his *Atkins* claim.

VI. CONCLUSION

For nearly five decades, Texas has confined Mr. Jordan under an unconstitutional death sentence. For nearly four decades, Mr. Jordan—an intellectually disabled, schizophrenic person, who this Court and the State long ago agreed was incompetent—has been without counsel who might advocate for him. Mr. Jordan has been intellectually limited since childhood, and by his young adulthood lost first his mind, then his freedom, and then counsel or access to legal process, all the while he possessed meritorious claims for relief. Instead, Mr. Jordan

¹⁸ In *In re Tex. Dep't of Criminal Justice*, No. WR-95,689-01, 2025 WL 907711 (Tex. Crim. App. Mar. 26, 2025), this Court recently held that Texas district courts were without jurisdiction to facilitate discovery and investigation prior to the filing of a subsequent post-conviction application for a writ of habeas corpus. Mr. Jordan has been incarcerated, and under the care, custody and control of the State, in connection with this case for the last 48 years. Before that as a juvenile, he spent time in custody and under the supervision of Harris County Juvenile Probation. Certainly, records in the possession of different governmental bodies, including, but not limited to Texas Department of Criminal Justice, the Harris County Sheriff, the Harris County District Attorney, Harris County Community Supervision & Corrections Department, the Harris Center for Mental Health and IDD (MHMR), and the Houston Police Department, will contain additional evidence and observations relevant to Mr. Jordan's intellectual functioning and impairments. Further, counsel has substantiated this claim with the intellectual and psychological assessments found in the record in this case, but lacks access to the raw data of these mental health evaluations. As such, counsel asks that, in connection with the remand of this matter, this Court order discovery of all prior intellectual assessments and associated raw data and other relevant evidence, since *In re TDCJ* deprived Texas trial courts of the jurisdiction to facilitate such investigation prior to the filing of a habeas application and subsequent authorization pursuant to Texas Code of Criminal Procedure article 11.071 section 5.

has languished in a prison, forgotten, unable to on his own bring this application for relief.

Mr. Jordan asks that this Court overturn his death sentence the jury who sentenced him to death did not have an adequate vehicle through which it might assess the mitigating evidence of cognitive and psychiatric dysfunction presented during his trial and give Mr. Jordan the individualized sentencing determination that the Eighth Amendment demands. In the event that this Court does not grant relief on Claim One based on the allegations in this petition and the strength of the record, but determines that further proceedings are necessary, Mr. Jordan asks that this Court authorize Claims One and Two pursuant to Article 11.071 Section 5, remanding both for further evidentiary development, discovery, and findings of fact and conclusions of law.

Respectfully submitted,

DATED: May 5, 2025

/s/ Benjamin Wolff

/s/ Guillermina Passa

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Attorneys for Mr. Jordan

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2025, I have caused a true and correct copy of the foregoing Subsequent Application for Writ of Habeas Corpus to be served by email on counsel for the State as follows:

Aimee Bolletino, Assistant District Attorney, Harris County District Attorney's Office, bolletino_aimee@dao.hctx.net;

Farnaz Hutchins, Assistant District Attorney, Harris County District Attorney's Office, Hutchins_farnaz@dao.hctx.net;

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Scott Pope, Assistant District Attorney, Harris County District Attorney's Office, Pope_scott@dao.hctx.net.

/s/ Benjamin Wolff

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I hereby certify that this Subsequent Application for Writ of Habeas Corpus was computer generated and is 9,440 words in length, in compliance with Tex. R. App. Proc. 9.4(i)(2)(A).

/s/ Benjamin Wolff

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Benjamin Wolff, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Texas.
2. I am the duly authorized attorney for Mr. Clarence Jordan having authority to prepare and verify Mr. Jordan's Subsequent Application for Writ of Habeas Corpus.
3. I have prepared and have read the foregoing Subsequent Application, and I believe all allegations therein to be true to the best of my knowledge.

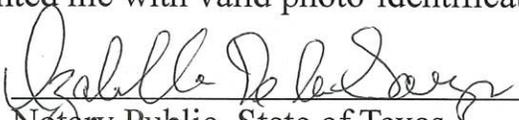
Signed under penalty of perjury:



Benjamin Wolff

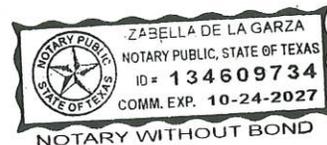
May 5, 2025
Date

State of Texas, County of Travis, SWORN to and SUBSCRIBED before me, the undersigned authority, on 5th day of May, 2025, by the person whose signature appears above, who is personally known to me OR presented me with valid photo-identification.



Notary Public, State of Texas

My Commission Expires: 10-24-2027



R-1
dv
8-9-72

R. O. D. SCHOENBACHER
CHIEF JUVENILE
PROBATION OFFICER



D. H. BAKER
ASST. CHIEF JUVENILE
PROBATION OFFICER

JUVENILE PROBATION DEPARTMENT
MENTAL HEALTH SERVICES SECTION
3540 WEST DALLAS AVENUE
HOUSTON, TEXAS 77019

KENNETH S. SOLWAY, Ph.D
Texas Research Institute
for Mental Sciences

INTELLECTUAL EVALUATION

Name: Clarence Jordan, N/M/15
Birthdate: 4-6-56
Caseworker: Patty Rotrock
Examiner: Marilu Ellis
Date: 5-18-71

Clarence Jordan was seen on May 18, 1971 in consultation for the Harris County Juvenile Probation Department at which time the WISC, DAP and Bender were administered. Clarence began talking as soon as the examiner took him from the Detention Ward. He continually asked questions and kept quizzing the examiner concerning his test and if it were being sent to the judge. At first, Clarence's conversation appeared cocky and oppositional, but as testing progressed, it began to be somewhat inappropriate.

On the Wechsler Intelligence Scale for Children, Clarence scored in the Mental Defective range (Verbal Scale I.Q. = 60; Performance Scale I.Q. = 60; Full Scale I.Q. = 56). Clarence is basically a very dull, simple, underdeveloped boy whose intellectual potential is likely not any greater than at the above stated level. There are indications of specific perceptual disabilities which suggest the possibility of organic deficit. His hyperactivity may be in part explained upon this basis but it should be recognized that this occurs in the context of a boy with a very low overall intellectual development. His intellectual disabilities are certainly not entirely on the basis of neurological dysfunction.

In addition, Clarence does not have any sense of social appropriateness and his behavior is often random and very pointless. This suggests that there is a very poor sense of awareness of self or understanding of his position in the social context. He is apt to act very impulsively without an awareness of any consequences of his behavior. Clarence is massively lacking in social comprehension.

It is recommended that Clarence be neurologically evaluated and medicated which might alleviate some of his hyperactivity. He will, of course, still have tremendous learning deficits and poor social awareness.

Marilu Ellis
Marilu Ellis, M. A., Examiner

Thomas H. Cook Ph.D / M.E.
Thomas H. Cook, Ph. D., Supervisor

*Dept's Ex # 2
10-3-83
dt*

HARRIS COUNTY PSYCHIATRIC HOSPITAL

9TH FLOOR JEFFERSON DAVIS HOSPITAL
1801 ALLEN PARKWAY
HOUSTON, TEXAS 77019
221-6615



R. J. GREER
ADMINISTRATOR

JON LINDSAY
COUNTY JUDGE

FORENSIC PSYCHIATRY UNIT

Psychological Evaluation Clarence Curtis Jordan May 11 & 23, 1978

Evaluation Procedures: Interview
 Ammons Test
 Bender Gestalt
 Rorschach Inkblot Technique

Mr. Jordan is a black male who was seen in the maximum security unit of the Harris County Psychiatric Hospital, pursuant to court order from the 184th District Court, Honorable Wallace Moore, Judge. He was informed as to the nature and purpose of the evaluation, and informed that a report would be written to the court.

On questioning, Mr. Jordan stated that he was twenty-one years of age and was born in April of 1956, but could not give the exact date of his birth. He stated that he was born in Abilene, Texas. He was sufficiently oriented as to time and place, but during evaluation he often mumbled in an incoherent manner, and was vague in response to direct questioning. For example, when asked the name of the president of the United States, Mr. Jordan stated that this was John Hill. When asked how Mr. Hill became president, Mr. Jordan stated "he just won." Mr. Jordan stated that he is married and "she's a nice wife." He stated that he does not know how long he has been married, and does not know his wife's address. He stated that he and his wife have three children, girls age 4 and 1 month, and a boy that he did not know the age. Mr. Jordan stated that he attended school to the sixth grade in Abilene, Texas. He stated spontaneously "the judge certified me a grown man when I was fifteen." Mr. Jordan stated that his mother is deceased, and "she talked

Exhibit B

Psychological Evaluation
Clarence Curtis Jordan

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May 11 & 23, 1978

to me after she died."

On further questioning, Mr. Jordan stated that he is charged with robbery. When asked who informed him of the charge, he stated that he saw it on his chart. He stated that he was arrested in February but he does not know what year. He stated that he has been in jail four or five months. When asked why he was charged with robbery, Mr. Jordan stated "I don't remember doing anything like that."

When asked if he had been in trouble with the law before, he stated that he had been in prison a long time ago. He stated that this was in the Texas Department of Corrections. When asked why he was in prison, he stated "because the authorities had a right to. I didn't even know what was going on." He stated that he thought that he had been in prison for about four years.

When asked the possible consequences of being found guilty of the present alleged offense, Mr. Jordan stated "I'll get probation." When asked if he had an attorney, he replied "I'm supposed to have one." He was extremely vague and incoherent when asked to elaborate.

Mr. Jordan stated that he had no history of mental illness which required in-patient or out-patient treatment. He denied abusing alcoholic beverages or drugs.

On questioning concerning symptoms of mental illness, Mr. Jordan stated that he experiences auditory hallucinations. He stated that he sees his wife in everything that she does, and that he hears her talking to him. "She loves me and wants to be with me." When asked what he saw his wife doing, he stated "the same as usual. Go to work, come home, feed me." Mr. Jordan further stated that he suffers dizziness, and feels as though he is going to faint. He stated that this feeling last occurred on the day prior to the ex-

Psychological Evaluation
Clarence Curtis Jordan

-3-

May 11 & 23, 1978

amination. He stated that he had experienced such feelings "all my life."

RESULTS:

On the Ammons Test, Mr. Jordan obtained an IQ of 60, which is in the mild mentally retarded range of intelligence.

On the Bender Gestalt, there were significant number of errors, indicating the presence of organic brain dysfunction.

On the Rorschach Inkblot Technique, there were no bizarre or absurd responses which would indicate the presence of a psychotic thought disorder.

Additional Information:

It was attempted to examine Mr. Jordan further on May 23, 1978, in order to determine if his condition improved. However, Mr. Jordan refused to leave his cell, and refused to talk with this examiner. Mr. Jordan had previously been seen by Dr. Nottingham of this unit, and Dr. Nottingham found no evidence of mental disease or defect.

IMPRESSIONS:

Concerning the difference in findings between the examinations of May 11, 1978 by this examiner and Dr. Nottingham's examination, there are two possibilities. Mr. Jordan may be malingering in order to delay trial proceedings, or he may indeed suffer organic brain dysfunction with periodic fluctuations in his mental status. Because of Mr. Jordan's refusal to cooperate on May 23, it was not possible to examine further either of these possibilities. For this reason, it is considered that there is insufficient information on which to base an opinion concerning Mr. Jordan's competency to stand trial.

FILED
HARRIS COUNTY

District Clerk

AUG 29 1983

JMB:da
D-5/24/78
T-5/25/78

Time: 12
Harris County, Texas

By M. C. [Signature]

J. M. Bloom
J. M. Bloom, Ph.D.
Psychologist

HARRIS COUNTY PSYCHIATRIC HOSPITAL

9TH FLOOR JEFFERSON DAVIS HOSPITAL
1801 ALLEN PARKWAY
HOUSTON, TEXAS 77019
221-8615



466

FORENSIC PSYCHIATRY UNIT

R. J. GREER
ADMINISTRATOR

JON LINDSAY
COUNTY JUDGE

Psychological Examination Clarence Jordan June 28, 1978

Mr. Jordan is a twenty-two year old black male who was seen at the Harris County Psychiatric Hospital, pursuant to court order from the 184th District Court, Honorable Wallace Moore, Presiding. Mr. Jordan was previously seen by this examiner on May 11, 1978, and an attempt was made to examine him on May 23, 1978. On the former occasion, insufficient information was obtained in order to render an opinion concerning his competency to stand trial. The results of psychological assessment techniques revealed the presence of organic brain dysfunction, mild to moderate degree. On the later occasion, Mr. Jordan refused to speak with this examiner. On May 18, 1978, Mr. Jordan was examined by Dr. John Nottingham, psychiatrist of this unit, who gave the opinion that Mr. Jordan is competent to stand trial. On June 22, 1978, I again attempted to examine Mr. Jordan at the Harris County Psychiatric Hospital. He answered several questions in an appropriate manner, but then became agitated. He advanced toward me in an extremely threatening manner, and deputys were summoned. Mr. Jordan had ample opportunity to attack me physically, but did not do so. He was then restrained by the deputys and returned to his cell.

On June 23, 1978, Mr. Jordan was seen by Dr. Gilbert Lewis, psychiatrist of this unit. Dr. Lewis informed me that a similar incident occurred, and that Mr. Jordan again had to be restrained and returned to his cell. Dr. Lewis further stated that, about one and a half hours later, Mr. Jordan

Psychological Examination
Clarence Jordan

-2-

June 28, 1978

spoke to Dr. Lewis from his cell, and Dr. Lewis noted that Mr. Jordan spoke calmly, denied his participation in the offenses with which he is charged, and stated that his attorney's name is Fred Daily.

On June 27, 1978, Mr. Jordan was again brought to the Harris County Psychiatric Hospital, and examined by Dr. Nottingham, with this examiner and Dr. Lewis present. Mr. Jordan demonstrated adequate memory for recent and remote events, gave the name of his attorney, and stated that he had talked with his attorney recently. Mr. Jordan stated that he is charged with capital murder and five counts of robbery. He then complained of being asked so many questions, and he was then allowed to return to his cell.

Considering these observations, it is apparent that Dr. Nottingham has a rapport with Mr. Jordan which I was not able to establish. In Dr. Nottingham's report, however, he stated that Mr. Jordan is hostile and angry because he is being held in jail on charges of which he believes he is innocent.

IMPRESSION:

In consideration of all of the available evidence which I have concerning Mr. Jordan, I believe that he is presently competent to stand trial to that he has sufficient rational and factual understanding of the nature of the charges and proceedings against him, and has sufficient rational ability to consult with his attorney in the preparation of his defense, if he so chooses.

F I L E D

FRED HARDY
District Clerk

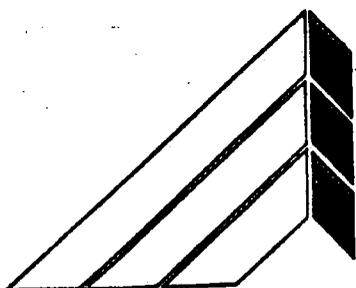
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JMB:da
D-7/12/78
T-7/13/78

Time 12
Harris County, Texas
By [Signature]

[Signature]
J. M. Bloom, Ph.D.
Psychologist

Dept's Exh #1
10-3-83
dt



The Mental Health and Mental Retardation Authority for Harris County

FORENSIC PSYCHIATRIC SERVICES

3rd Floor, Harris County Jail * 1301 Franklin
Houston, Texas * 77002

Administration: 713/221-7291
Social Service: 713/221-7296
Forensic Service: 713/221-6904

FORENSIC PSYCHIATRIC UNIT

Honorable Wallace Moore
Judge, 184th District Court
Harris County, Texas

Re: Clarence Curtis Jordan
Cause No.: 276428
Charge: Capital Murder

Dear Judge Moore:

The above-named defendant was interviewed and examined on November 10, 1982 pursuant to an order from your court. The defendant was warned at the beginning of the evaluation that a report concerning what was discussed would be sent to the court and might come up in the proceedings against him. He was told that he did not have to answer any questions and could end the interview at any time. Mr. Jordan indicated that he understood the warning and that he would be willing to participate in the interview. The defendant answered most of the questions asked of him and later complied reluctantly with the administration of a brief intelligence test. He refused, however, to participate in other psychological testing, explaining that such material upset him and that he did not like it. Despite this refusal, it is felt that sufficient information was gathered to justify the conclusions in this report and to satisfy the requirements of the court order.

The defendant was seen for evaluation on the third floor of the Harris County Jail building. He was presented as a reasonably neat, well-groomed, bearded black male of small stature. He appeared well-nourished and looked to be his stated age of 26. He had several home-made tatoos on his arms, most notably the word "Shaft" lettered on his right forearm. When asked about the mark, he stated that he had done it himself but wanted to have it removed now. No other physical defects or marks were noted. Throughout the interview the defendant was articulate, coherent and well-oriented. At one point he claimed to be hearing voices in his left ear but was not noticeably disturbed or frightened by this occurrence. His mood was appropriate to the situation and he gave no indication of emotional distress or depression.

The defendant was evaluated originally by Dr. John Nottingham of the Harris County Forensic Psychiatry Unit on May 18, 1978. Because of this the present evaluation was largely confined to the events since that time and to the defendant's current mental state. The highlights of the defendant's early history were reviewed with the defendant and will be reported briefly. He was raised in Houston by his mother but does not know what became of his father. He mentioned one brother and sister, both of whom are living but his mother is now deceased. He completed only the ninth grade and remembers "fighting all the time" in school. At the age of sixteen the defendant claims to have been sent to prison for robbery but was released at age nineteen. He stated that he remembers "selling a little grass" when he was younger but then stated "I don't remember the details...its too deep for me". The defendant denies his guilt in this robbery conviction at age sixteen and stated "some sucker stole my car and used it in a robbery". He also denies any guilt with regards to the present alleged offense, stating that he believes

he was arrested and accused of the offense only because he has a robbery conviction on his record. In this respect he stated "You can't get a fair trial with white folks on the jury." When asked if a black jury would be fair he stated "Black folks are no good on a jury either...Everybody's just worried about being robbed...They don't know what its like to be starving."

Since the defendant claimed to have been innocent in both of his convictions, he was asked if he ever did break the law. He stated that other than "a little dope dealing" the only thing illegal he ever did was "break in and steal things that the big guys told me to steal when I was a small boy."

When asked about his recent stay in prison, the defendant stated that he had spent time on the psychiatric treatment unit at the Texas Department of Corrections Goree Unit. He stated that he had been given Thorazine, a major psychiatric tranquilizer, and Cogentin, which is used to control the side effects of Thorazine. He stated that he had also been confined at the Ellis Unit where he had been given Prolixin, another anti-psychotic medication usually used in long term maintenance therapy.

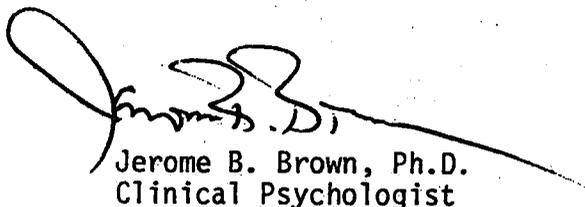
The defendant stated that he has been bothered by hallucinatory activity for many years. When asked what he saw and heard he stated "Old, weird, burnt-up looking people... appearing here and there...people slashing at my ear...ugly as a son-of-a-bitch". When asked if these things frightened him the defendant stated "I just turn my head and ignore them". He then told about one occasion when he was hiding under his blanket in a cell and one of the "burnt-up looking people reached over and hit me on the head through the blanket". He was asked if the blow left a mark and he stated "no mark...I just felt it on my head". When asked what other kinds of things he heard that other people would not hear, the defendant stated "all kinds of crazy shit...God is a creature... they're a creature...they come from all around me...in my ear...loud talking...just like you're talking...not that loud, but loud enough". When asked how long he had such experiences, the defendant stated that it had been going on since he was a small child. He described an incident which he saw a "creature in a nightgown" when he was five or six years old. He said "she ran me back into my house". He said that he had always seen strange things and heard voices but "I just never said nothing about them". On further questioning he stated that he had told a doctor who had treated him for a stab wound about the appearances and that the doctor had sent him to see another doctor, but he could not remember the name of either doctor, and did not know where either of their offices were. Finally the defendant described how he had heard voices when he was five or six years old("they always told me to sit down...they wanted to feed me, but they didn't"). The defendant stated that the hallucinations had gotten worse in prison and that medication had been essentially no help. He said he didn't know what kind of treatment he needed, but nothing so far had worked for him.

At this point in the interview the defendant stopped talking and brushed at his left ear with his hand. When asked what he was doing he stated "I just want to get this shit out of my ear". When questioned further he explained that voices were speaking to him and that they said "they ain't shit, they work for J.D."

When asked about his present legal situation, the defendant stated that he was being given a new trial because his juvenile conviction had been brought up in court and "had prejudiced the jury". He indicated that he understood why this entitled him to a new trial and indicated that he intended to plead innocent. He stated that he had talked to his present lawyer two or three times, both in jail and in court. He stated that his next court appearance is scheduled for December 7th and indicated that he understands that the present legal proceedings could result in another death sentence or prison term.

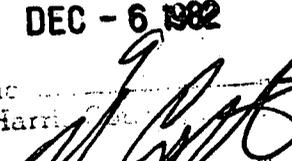
Mental status examination and intelligence testing revealed that the defendant was alert, coherent, logical, well-oriented and functioning in the dull normal range of intelligence (IQ=80-85). Although he claimed to have a history of auditory and visual hallucinations,

and even claimed to have had an auditory hallucination during the interview, the defendant seems to be maintaining good contact with reality and seems to have no difficulty communicating his ideas and understanding questions. The kind of hallucinations described by the defendant are impossible to verify other than through the defendant's own subjective report. However, even if he is really experiencing what he says, there is no indication that this experience would interfere with his present ability to think logically and understand reality. Furthermore, the evidence available to this examiner gave no indication that these claimed hallucinatory experiences contributed in any way to the defendant's performance of any illegal act or interfere currently with any basic psychological functions. The defendant appears to be capable of seeing the world around him as others see it and he understands and responds appropriately to questions and other situational demands. He demonstrates a clear understanding of his current legal predicament and seems to have no problems with concentration. He reports having appropriate conversations with his lawyer and understands the nature of the proceedings against him. In view of the above results, it is the opinion of this examiner that this man is capable of forming a rational as well as factual understanding of the proceedings and that he is capable of assisting with his own defense and consulting with his attorney with a reasonable degree of rational understanding. For these reasons, he should be considered competent to stand trial at this time.


Jerome B. Brown, Ph.D.
Clinical Psychologist

JBB:clp

F I L E D
FBI
Dist. Clerk
DEC - 6 1982

Time _____
Harr. _____
By  _____
Dept _____

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